



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION GRANTED: June 29, 2007

CBCA 50-R

TIDEWATER CONTRACTORS, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Joseph A. Yazbeck, Jr., of Yazbeck, Cloran & Hanson, LLC, Portland, OR, counsel for Appellant.

David Sett, Division Counsel, Federal Highway Administration, Lakewood, CO, counsel for Respondent.

Before Board Judges **STERN**, **FENNESSY**, and **SOMERS**.

SOMERS, Board Judge.

Appellant, Tidewater Contractors, Inc., (Tidewater) has filed a motion seeking reconsideration of the Board's decision in the underlying appeal, *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50, 07-1 BCA ¶ 33,525. For the reasons set forth below, we grant appellant's motion and modify our earlier decision.

The case involves a contract between the Department of Transportation, Federal Highway Administration (FHA), and Tidewater for road work. The Government issued what it characterized as an "off-site" notice to proceed on January 5, 2004, which set the project completion date for August 10, 2005. The Government held the preconstruction conference on February 5, 2004. By final decision issued on August 12, 2005, the

contracting officer rejected appellant's claim that the January 5, 2004, notice to proceed did not meet contract requirements and that the project completion date should be modified.

The Board rejected the Government's argument that the contract permitted the Government to issue an "off-site" notice to proceed prior to the preconstruction conference. The Board held that the contract specifications called for the Government to give Tidewater the notice to proceed within a specified period of time, and that the Government had failed to comply with that provision. Based upon the fact that the contract put the burden of scheduling the preconstruction conference upon the contracting officer and that the contractor could not proceed to work on the contract until after the preconstruction conference, the Board found that the Government caused the delay from January 5 to February 5, 2004, a period of thirty days. However, the Board rejected Tidewater's claim of entitlement to an additional time extension because Tidewater had failed to provide an adequate quality control plan. The Government issued the notice to proceed on April 5, 2004, after it accepted Tidewater's revised quality control plan.

In its motion for reconsideration, appellant contends that no work could proceed under the contract until a valid notice to proceed was issued, and that none was issued until April 5, 2004. Based upon this analysis, appellant concludes that the Board made a mistake of law by concluding that the time for contract performance began to run after the preconstruction conference. After reevaluating the record and arguments in this case, the Board concludes that the previous decision erred in granting only a portion of appellant's claim.

Discussion

Appellant, in its motion for reconsideration, argues that the Board's decision was incorrect as a matter of law. In this regard, the Board does not grant reconsideration on the basis of arguments already made and reinterpretations of old evidence. *Tom & Tony's Auto Wrecker Service v. General Services Administration*, GSBCA 15698-R, 03-1 BCA ¶ 32,217. To warrant reconsideration, the moving party must make a satisfactory showing that revisiting the matter is appropriate. *Zinger Construction Co. v. General Services Administration*, GSBCA 11039-R, 92-3 BCA ¶ 25,039, at 124,814. In evaluating a request for reconsideration, a tribunal must "strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the incessant command of the [tribunal's] conscience that justice be done in light of *all* the facts." *Advanced Injection Molding, Inc. v. General Services Administration*, GSBCA 16504-R, 05-2 BCA ¶ 33,097, at 164,063 (citing *Koll Construction Co. v. General Services Administration*, GSBCA 12306-R, 94-2 BCA ¶ 26,599, at 132,344). "Reconsideration is always appropriate where the tribunal is convinced that correcting the original decision may be necessary to avoid a

manifest injustice.” *Twigg Corp. v. General Services Administration*, GSBCA 14639-R, 99-1 BCA ¶ 30,310, at 149,877. The tribunal would be so convinced where the movant “point[s] to controlling decisions or data that the [tribunal] overlooked – matters, in other words, that might reasonably be expected to alter the conclusions reach[ed] by the [tribunal].” *Rowe, Inc. v. General Services Administration*, GSBCA 15217-R, 03-1 BCA ¶ 32,215, at 159,328-29 (citing *Shrader v. CSX Transportation, Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)).

We grant Tidewater’s motion because it has convinced us that we misunderstood the contractor’s claim for relief. In its motion for reconsideration, Tidewater points to the contract, which includes an amended¹ version of Federal Acquisition Regulation 52.211-10:

52.211-10 Commencement, Prosecution, and Completion of Work (Apr 1984) - Alternate I (Apr 1984)

The Contractor shall be required to (a) commence work under this contract within 10 calendar days after the date the Contractor receives the notice to proceed, (b) prosecute the work diligently, and (c) complete the entire work ready for use no later than (See Standard Form 1442). The time stated for completion shall include final cleanup of the premises.

The completion date is based on the assumption that the successful offeror will receive the notice to proceed by the 70th day following the bid opening. The completion date will be extended by the number of calendar days after the above date that the Contractor receives the notice to proceed, except to the extent that the delay in the issuance of the notice to proceed results from the failure of the Contractor to execute the contract and give the required performance and payment bonds within the time specified in the offer.

Appeal File, Exhibit 1 at F-6. Tidewater contends that it is entitled to an extension if the Government delayed issuance of the notice to proceed, unless Tidewater failed to execute the contract or to give the required performance and payment bonds within the time specified. Because there is no dispute that the contractor accomplished those tasks,

¹ FAR 52.211-10 contains blanks. These blanks have been filled in by the Government in the text included in the contract.

appellant claims that as a matter of law under the contract, it is entitled to a day-for-day extension of the eighty-nine days between the seventieth day following bid opening (January 8, 2004) and April 5, 2004, the date the Government issued the notice to proceed.

Appellant takes issue with that portion of the Board's holding that the contract time began to run after the preconstruction conference. In its motion for reconsideration, appellant clarifies its argument, focusing on the fact that the contract requires the Government to issue a notice to proceed by the seventieth day following bid opening once Tidewater had executed the contract and provided the performance and payment bonds. Appellant points out that the Board's finding that Tidewater was contractually obligated to prepare a quality control plan did not create a basis for the Government to delay the issuance of the notice to proceed until April 5, 2004.

Appellant is correct in its statement that the contract does not expressly require the contractor to perform any other tasks other than to execute the contract and give the required performance and payment bonds prior to the issuance of the notice to proceed. The contract required that the Government hold a preconstruction conference before it could issue the notice to proceed. By failing to schedule the preconstruction conference and issue the notice to proceed by the seventieth day following bid opening, the Government became obligated to grant an extension of the completion date for each day after the seventieth day following bid opening.

In its opposition to appellant's motion for reconsideration, the Government states that "the Commencement, Prosecution and Completion of Work clause is supplemented and limited by FP-96, *Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects*, 1996, § 108.03." Government's Motion in Opposition to Appellant's Motion for Reconsideration at 2. Section 108.03 provides that "only delays or modifications that affect critical activities or cause noncritical activities to become critical will be considered for time extension."² The Government posits that the delay in the

² The entire text of FP-96, § 108.03, provides as follows:

Only delays or modifications that affect critical activities or cause noncritical activities to become critical will be considered for time extension.

When Critical Path Method schedules are used, no time extension will be made for delays or modifications that use available float time as shown in the current construction

issuance of the notice to proceed did not affect the critical construction activities because Tidewater never had any intention on starting the job earlier than it did. As evidence, the Government asserts that Tidewater admitted that it had failed to submit a schedule or schedule narrative to the Government at the preconstruction conference, and, instead, submitted it on February 27, 2004. The Government claims that Tidewater did not submit a schedule in compliance with the contract until April 7, 2004, when Tidewater provided its final revised version. Because Tidewater has not shown that any critical activities had been delayed prior to April 5, 2004, the Government contends that Tidewater cannot rely upon the Commencement, Prosecution, and Completion of Work clause as a basis for an extension of time for contract performance.

This issue presents a question of contract interpretation. It is well established that “the language of a contract must be given that meaning that would be derived from the

schedule required by Section 155.

Time will not be extended for a claim that states insufficient time was provided in the contract.

When requesting a time extension, follow the requested contract time adjustment including the following:

- (a) Contract clause(s) under which the request is being made.
- (b) Detailed narrative description of the reasons for the requested contract time adjustment including the following:
 - (1) Cause of the impact affecting time
 - (2) Start date of the impact
 - (3) Duration of the impact
 - (4) Activities affected
 - (5) Methods to be employed to mitigate the impact
- (c) Suggested new completion date or number of days supported by current and revised construction schedules according to Section 155.

contract by a reasonably intelligent person acquainted with the contemporaneous circumstances.” *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965). Contract interpretation ordinarily begins with “the plain meaning of the provision in question.” *S.W. Aircraft Inc. v. United States*, 551 F.2d 1208, 1212 (Ct. Cl. 1977). Generally, the plain language of a contract controls, and only language which is reasonably susceptible to more than one meaning may be considered ambiguous. *John C. Grimberg Co. v. United States*, 7 Cl. Ct. 452, 457, *aff’d*, 785 F.2d 325 (Fed. Cir. 1985) (table).

In this case, the FAR provision in question, FAR 52.211-10, expressly states that the completion date *will* be extended by the number of calendar days after the seventieth day following bid opening, the date by which the contractor should have received the notice to proceed. The FAR clause uses the word “will” in a mandatory, not permissive, sense. The only exception to the mandatory extension of the completion date is when the delay results from the contractor’s failure to execute the contract and give the required performance and payment bonds.

The Government seeks to modify the FAR clause by arguing that FP-96, § 108.03, limits the extension of the completion date to those delays or modifications that affect critical activities. FP-96 cannot modify FAR provisions unless a deviation is granted in accordance with FAR 1.402 to .404, which govern individual or class deviations to the FAR. There is no evidence that any deviation has been granted so as to change the scope of FAR 52.211-10. In addition, FP-95, § 108.03, does not “limit” the FAR clause; rather, as expressly stated, the subsection “supplement[s]” the clause. Supplement means “to fill up or supply with additions; add something to. . . .” Webster’s Third New International Dictionary, Unabridged (1986). It does not mean to “limit.”

In determining the order of precedence of the contract documents, FP-96, § 104.04, provides that the documents govern in the following order:

- (a) Federal Acquisition Regulations
- (b) Transportation Acquisition Regulations
- (c) Special contract requirements
- (d) Plans
- (e) Supplemental specifications
- (f) Standard specifications

To adopt the Government’s argument requires one to ignore the plain meaning of the section, which is intended to supplement, not limit the FAR provision. In addition, to the extent that the section, which, as part of FP-96, is a standard specification, could be

construed to be inconsistent with the mandatory requirement set forth in the FAR, the FAR clause governs.

The Board finds that the Government's argument that Tidewater must prove the delay in the issuance of the notice to proceed impacted critical activities of its schedule is not a reasonable interpretation of the contract. FAR 52.211-10 does not require Tidewater to prove the delay impacted its activities. The contractor need only execute the contract and provide the required performance and payment bonds – at that point, the Government “will” extend the completion date by the number of days after the seventieth day after bid opening that the issuance of notice to proceed is delayed. Whether Tidewater failed to submit a proper quality control plan, or, as the Government now argues, Tidewater failed to submit a proper construction schedule, the fact remains that the Government did not issue a notice to proceed until April 5, 2004.

In sum, upon further review of the record, the Board concludes that appellant is correct. The contract does not permit the contractor to begin work in the absence of a valid notice to proceed. In addition, the Board finds that there is no contract requirement to prepare a quality control plan or to submit an approved construction schedule prior to receipt of the notice to proceed. The record contains no evidence of any action, inaction, or failure to fulfill other contract requirements by appellant that hindered the issuance of the notice to proceed. Therefore, the Board agrees, on reconsideration, that the time for contract performance could not run until the Government issued the notice to proceed. The Board finds that appellant is entitled to an extension of the contract completion date of eighty-nine days.

Decision

Tidewater's **MOTION FOR RECONSIDERATION** is **GRANTED**. Our decision is modified on reconsideration to delete the finding that Tidewater did not meet its burden of proof to establish entitlement to the remaining extension of time sought in the appeal. The decision is amended to reflect that Tidewater has established entitlement to an eighty-nine day extension of the contract completion date, and to indicate that the appeal is granted.

JERI KAYLENE SOMERS
Board Judge

We concur:

JAMES L. STERN
Board Judge

EILEEN P. FENNESSY
Board Judge